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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
JESSIE HERRERA,  
Defendant and Appellant.

A155354  
(Humboldt County  
Super. Ct. No. CR1800714)

Defendant Jessie Herrera was convicted by a jury of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)<sup>1</sup>) and possession of ammunition by a felon (§ 30305, subd. (a)(1)). After the trial, the court accepted defendant's admission that he had a prior robbery conviction, a sentencing enhancement. (§ 677, subds. (b)–(i)). Before sentencing, defendant filed a *Romero* motion (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504) seeking to strike the prior conviction, which was opposed by the People. The court denied defendant's *Romero* motion and imposed an aggregate term of imprisonment of four years: the middle term of two years, doubled for the prior conviction, for the firearm possession conviction, and a concurrent term of two years, doubled for the prior conviction, for the ammunition possession conviction.

We agree with defendant that, under the totality of the circumstances, the record does not affirmatively demonstrate that he voluntarily and knowingly admitted the prior conviction allegation. Accordingly, we set aside the admission and reverse the imposed

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<sup>1</sup> All further unspecified statutory references are to the Penal Code.

sentences. The matter is remanded for a new adjudication of the prior conviction allegation, by admission after proper waivers or trial, and for resentencing. In light of our determination, we need not address defendant's other contentions challenging certain aspects of his sentence and an error in the abstract of judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The charges filed against defendant were based on a traffic stop of the jeep in which defendant was a front seat passenger. A police officer on patrol in his car stopped the jeep after observing the driver commit three vehicle code violations. The officer approached and asked the driver for his license, registration, and proof of insurance. Physically shaking, the driver retrieved his license and registration from the glove box in front of defendant's seat but did not provide proof of insurance. At that time, the police officer did not see any firearm in the glove box. The officer learned from "dispatch" that the driver was on probation with search terms and defendant had an outstanding felony warrant. The officer detained and handcuffed both men and placed them in the patrol car, with defendant in the back seat and the driver in the front seat. The officer then searched the jeep and found, inside the glove box and under paperwork, a .38 Smith & Wesson revolver loaded with five live rounds of ammunition and additional live ammunition.

Because the police officer did not know which man owned the firearm and ammunition, he read each man his *Miranda* rights and questioned them about the items found in the jeep. As the officer was reading the driver his *Miranda* rights, the driver spontaneously said, "That is not mine." Once the officer finished reading the *Miranda* rights, and the driver waived his rights, the officer asked, "So what's going on with that gun?" referring to the gun in the glove box, and the driver simply said, "It's not mine," and "That is not mine." When the officer asked the driver whose gun it was, the driver again repeated that the gun was not his. The officer then told defendant he was going to read him his *Miranda* rights. After getting defendant's acknowledgement that he understood his rights, the officer asked defendant, "[T]here's a gun in the . . . glove box right in front of you want to tell me about that?" Defendant admitted that the gun was his and also admitted the "ammo" was his. When the officer asked defendant if the gun had

been stolen, defendant said he found the gun. The officer arrested defendant, and the driver was given citations for vehicle code infractions and released.

### **DISCUSSION**

Defendant contends he is entitled to a new adjudication of the prior conviction allegation because the trial court failed to advise him of his constitutional rights and penal consequences of his admission to the allegation, and the record does not otherwise affirmatively demonstrate he voluntarily and knowingly made his admission. We agree.

Before accepting a defendant's admission to a prior conviction allegation, the trial court should "advise the defendant and obtain waivers of (1) the right to a trial to determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront adverse witnesses." (*People v. Mosby* (2004) 33 Cal.4th 353, 356 (*Mosby*).) In addition to admonition of these constitutional rights our Supreme Court has advised, " 'as a judicially declared rule of criminal procedure,' " that a defendant is entitled to be advised that: (1) he may be adjudicated an habitual criminal, (2) the precise increase in the term or terms which might be imposed, and (3) the effect on his eligibility for parole. (*In re Yurko* (1974) 10 Cal.3d 857, 864.) "The focus is not on whether [the allegation] would have been found true, but on whether the defendant knew of his constitutional rights" and penal consequences of his admission. (*People v. Stills* (1994) 29 Cal.App.4th 1766, 1770.)

The record indicates the charges against defendant were originally tried before a jury on May 16 through 18, 2018. After several hours of deliberation, the jury foreperson informed the court that the jury was deadlocked, and the court declared a mistrial. Thereafter, on July 12 and 13, 2018, the court conducted a second jury trial, which resulted in a verdict finding defendant guilty of both possession of a firearm and possession of ammunition.

At the beginning of the second trial, the court informed the parties it intended to conduct the new trial "much like we did the last one . . . ." During later colloquy concerning the use of defendant's prior felony robbery conviction for purposes of impeachment should he choose to testify, the prosecutor stated he anticipated that

defendant would stipulate to his prior felony conviction, “which did happen in the previous trial.” Defense counsel then confirmed that defendant “would stipulate to the prior felony conviction” and, if he chose to testify, defendant understands “the record will come in.” The court later secured defendant’s agreement that he would stipulate to the fact that he had been convicted of a felony, which stipulation was set forth in the Court’s Exhibit 1.

Following the prosecution’s case, the defense rested without presenting any evidence. The court then advised the jurors:

“Okay. So, that brings us to the end of trial. There has been a stipulation between both the parties. I’m going to read you that stipulation. A stipulation is a set of facts that both sides agree on. This is Court Exhibit 1. You can have a copy of this if you so wish to in the jury box when you deliberate.

“Stipulation of the parties: . . . [T]he parties, both the People and the Defense, have stipulated that [defendant] has been convicted of a felony. . . .

“Because the parties have stipulated to these facts, you must accept them as true.”

Immediately after the jury’s verdict was accepted, the trial court held an in-chambers conference with defendant and counsel. The court inquired about “the issue of the bifurcation.” Defense counsel replied, “There will be an admission to the special allegation.” The court then proceeded to elicit defendant’s admission to the prior conviction allegation before excusing the jury:

“THE COURT: All right. I am going to inform – shall we do that right now?

“[DEFENSE COUNSEL]: Sure.

“THE COURT: Do you admit or deny the special allegation . . . ?

“[DEFENDANT]: Yes.

“THE COURT: Do you admit?

“[DEFENDANT]: Yes.

“[PROSECUTOR]: Does the Court mind specifically taking [sic] that he was previously convicted of a serious felony?

“THE COURT: Yes. . . . I’m [going to] read that to you. The answer at the end will be admission or denial. You can say either one. It’s up to you.  
It is further alleged as to Counts One and Two, pursuant to Penal Code section 667 (b) through (i), that the defendant, . . . , has suffered the following prior conviction of a serious or violent felony: Robbery, 211, on the date of October 4, 2007. Court Case No. SF104225A, out of the County of San Joaquin. Do you admit or deny?

“[DEFENDANT]: Admit.

“THE COURT: Do you wish anything else?

“[THE PROSECUTOR]: No, your Honor.

“THE COURT: You didn’t admit to anything other than that. We just did it officially this time. So, we’re [going to] go back out there and I’ll let the jury know – thank them for their service and let them know what happened in here and I’ll read them the concluding instructions.”

When the court reconvened in the presence of the jury, the court informed the jury as follows:

“Part of the case was bifurcated. That means that it was to be decided after the issue of guilt came in. And at times, a jury could then end up deciding the second half of the case; but, in this case, [defendant] admitted the special allegation . . . which is that prior conviction that you heard the stipulation about. He admitted that he had had that prior conviction. So, that does have some sentencing consequences but it doesn’t affect whether or not he’s innocent or guilty. That’s why we separated those two portions of the case.”

There is no question that the trial court committed error by accepting defendant’s admission to the prior conviction allegation without advising him of his constitutional rights to a trial, the right to confront witnesses, and the right against self-incrimination, and without obtaining waivers of those rights. Additionally, the record indicates the trial

court failed to advise defendant of the specific penal consequences of his admission, namely, that any sentence imposed by the court would be doubled by his admission. Thus, our task is to determine whether, in light of the court’s failures to make the necessary advisements, the record otherwise affirmatively shows the admission was voluntarily and knowingly made under the totality of the circumstances. (*People v. Howard* (1992) 1 Cal.4th 1132, 1180 (*Howard*); see also *People v. Farwell* (2018) 5 Cal.5th 295, 303–304 [“the *Howard* totality of the circumstances test applies in *all* circumstances where the court fails, either partially or completely, to advise and take waivers of the defendant’s trial rights before accepting a guilty plea”].)

We conclude the record does not affirmatively demonstrate that defendant understood his constitutional rights or penal consequences before he made his admission to the prior conviction allegation. “We have no doubt that [defendant] was in fact aware of his right to a jury trial, his right to confront witnesses, and his right to remain silent, all of which he had just exercised in trial. What is impossible to determine from this silent record is whether [defendant] not only was aware of these rights, but was also prepared to waive them as a condition to admitting his prior [conviction.]” (*People v. Johnson* (1993) 15 Cal.App.4th 169, 178.) As we now explain, we see no merit to the People’s arguments that we may conclude otherwise.

The People first contend that defendant forfeited reliance on the trial court’s failure to admonish him of the penal consequences of his admission by failing to object in the trial court on this ground. However, a failure to object in the trial court does not preclude us from considering the lack of penal consequences advisement as a factor in determining whether the admission was “knowing and voluntary” under the totality of the circumstances. (*People v. Witcher* (1995) 41 Cal.App.4th 223, 233, 234 (*Witcher*) disapproved on another ground in *People v. Cross* (2015) 61 Cal.4th 164, 179.) Here, there is no evidence that any of the “ ‘three strikes’ consequences of [his] . . . admission were discussed with him [by the trial court]. The doubling of the base term” on the convictions, which resulted in an increase of two years in his sentence, was “directly attributable to his admission [and] is not insignificant.” (*Witcher, supra*, at pp. 233, 234

[despite defendant's failure to object, appellate court found it was appropriate to consider that defendant's admission resulted in an aggregate increase in his sentence of 24 months in determining whether his admission to a prior conviction allegation was voluntarily and knowingly made under the totality of the circumstances].)

Nor do we see any merit to the People's argument that defendant was aware of his constitutional rights and penal consequences of his admission because he had already participated in the first trial, which resulted in a mistrial, and he had also stipulated to the prior conviction in that trial. There is no indication in the record before us that during that first trial the court explained to defendant his constitutional rights or penal consequences of admitting to the prior conviction allegation. The People's citations to portions of the second trial and sentencing that occurred *after* the defendant made his admission similarly do not demonstrate defendant's knowledge of his constitutional rights and penal consequences at the time of his admission.

The People's reliance on defendant's previous experience in the criminal justice system is misplaced. Unlike the situation in *Mosby*, *supra*, 33 Cal.4th at p. 365, there is nothing in the record demonstrating that before defendant made his admission he had ever been advised of the constitutional rights he would be waiving by his admission to the prior conviction allegation either at the time of the first trial or any time during the second trial. Nor do we see anything in the trial court's comments to the jury *after* accepting defendant's admission that demonstrates he voluntarily and knowingly made his admission with an understanding of his constitutional rights and penal consequences.

In sum, because the record is insufficient to establish that defendant's admission to the prior conviction allegation was voluntarily and knowingly made under the totality of the circumstances, the admission must be set aside and the sentences imposed must be reversed. The matter is remanded to the trial court for a new adjudication of the prior conviction allegation for purposes of enhancing the sentences under Penal Code section 667, subdivisions (b)–(i), either by admission after proper waivers or trial, and for resentencing.

Because we are remanding the matter for a new adjudication on the prior conviction allegation and resentencing, we do not decide defendant's other claimed errors relating to his sentences and the abstract of judgment. At resentencing, defendant may renew his arguments regarding the applicability of section 654 and the court's calculation of his presentence custody credit, as well as his claim of a clerical error in the abstract of judgment concerning the criminal conviction assessment.

### **DISPOSITION**

The convictions are affirmed. The sentences are vacated and the matter is remanded to the trial court for a new adjudication of the truth of the charged prior conviction allegation for purposes of enhancing the sentences under Penal Code section 667, subdivisions (b)–(i), either by admission after proper waivers or trial, and for resentencing.

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Petrou, J.

WE CONCUR:

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Siggins, P. J.

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Fujisaki, J.